Office - Supreme Court, U.S.
FILED
APR 20 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1581

In the Supreme Court of the United States

October Term, 1982

NANETTE E. QUENNEVILLE, Executrix of the Estate of Charles F. Quenneville,

Petitioner,

vs.

DELMARK COMPANY, INC.; MOUNT SINAI HOSPITAL OF CLEVELAND, and VICTOR VERTES, M.D.; SAUL M. GENUTH, M.D.; IRENE HAZELTON, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF CONTRA CERTIORARI

LOUIS PAISLEY, *Counsel of Record*
CAROLYN M. CAPPEL
2500 Terminal Tower
Cleveland, Ohio 44113
(216) 241-6602
Counsel for Respondent Delmark Company, Inc.

Of Counsel:
WESTON, HURD, FALLON, PAISLEY & HOWLEY

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

REASONS FOR DENYING THE WRIT 1

ARGUMENT 3

Because the Discovery Rules Are "Accorded a Broad Treatment," the Discovery of the Names of Patients Is Permitted Under the Federal Rules of Civil Procedure and the Physician/Patient Privilege Should Not Be Extended to Prohibit Such Disclosure 3

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

General Motors v. The Director of N.I.O.S.H., 459 F. Supp. 235 (S.D. Ohio 1978) 6

In Re Albert Lindley Lee Memorial Hospital, 209 F.2d 122 (1953) 4

In Re Roberts, 106 Ohio App. 303 (Cuyahoga County, 1958) 5

In Re Winstead, 67 Ohio App. 2d 111 (Summit County, 1980) 5

Klein v. Prudential Insurance Co. of America, 177 N.E. 942 (Ct. App. N.Y. 1917) 4

Statutes

Federal Rules of Civil Procedure, Rule 26(B)(1) 3

Ohio Revised Code, Section 2317.02 6

No. 82-1581

In the Supreme Court of the United States

October Term, 1982

NANETTE E. QUENNEVILLE, Executrix of the Estate of Charles F. Quenneville,

Petitioner,

vs.

DELMARK COMPANY, INC.; MOUNT SINAI HOSPITAL OF CLEVELAND, and VICTOR VERTES, M.D.; SAUL M. GENUTH, M.D.; IRENE HAZELTON, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF CONTRA CERTIORARI

REASONS FOR DENYING THE WRIT

Petitioner asserts as her reason for granting a writ of certiorari that the trial court unjustifiably departed from the usual and accepted course of judicial proceedings when it denied the plaintiff the right to discover the names of other patients who had been on the same diet as plaintiff's decedent. Petitioner contends that the departure thwarted her ability to present her case and denied her a fair trial.

Petitioner has not demonstrated the manner in which the trial court departed from "the accepted and usual course of judicial proceedings" by determining, within its sound discretion, that the information sought by the plaintiff was privileged and thus not discoverable.

Petitioner has not shown how the trial court's alleged departure "thwarted" her ability to present her case and denied her a fair trial. The plaintiff's theory at trial was that plaintiff's decedent was negligently exposed to "an extra hazardous and dangerous diet" while on the Mt. Sinai Diet Program. As the Sixth Circuit Court of Appeals stated in its opinion,

> ". . . it also appears from the record that one of plaintiff's expert witnesses had the information sought by the Interrogatories available at the time of trial. This would render any error in the ruling harmless." (Petitioner's brief, appendix pages 8-3 & 4.)

Plaintiff was fully aware of the components of the Mt. Sinai Diet Program for the treatment of morbid obesity at the time of trial. Plaintiff produced three expert witnesses who openly expressed their opinions as to what they believed to be the substandard nature of the Mt. Sinai Diet Program. Plaintiff had a full and fair opportunity to litigate the issues in her case which opportunity was not abridged by the District Court's refusal to compel Answers to plaintiff's Interrogatories requesting the names of all individuals who complained about any ill effects or who died while on the Mt. Sinai Diet Program which utilized Optifast.

Petitioner must do more than simply assert that the trial court departed from usual judicial procedure. Petitioner must do more than merely contend that she was denied a fair trial.

ARGUMENT

BECAUSE THE DISCOVERY RULES ARE "ACCORDED A BROAD TREATMENT," THE DISCOVERY OF THE NAMES OF PATIENTS IS PERMITTED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND THE PHYSICIAN/PATIENT PRIVILEGE SHOULD NOT BE EXTENDED TO PROHIBIT SUCH DISCLOSURE.

The petition for a writ of certiorari does not appear to be directed toward defendant Delmark. Plaintiff's theory of liability as against Delmark at the trial was strict products liability. Petitioner appears to be seeking the writ of certiorari on the basis that the trial court erred in prohibiting the plaintiff from discovering from the defendant physicians and defendant hospital, the names and addresses of individuals complaining to the physicians about ill effects while using Optifast and the names of any people who died while on the Optifast diet program. The discovery sought by the plaintiff was directed to the physicians and in no way involved defendant Delmark.

However, since plaintiff's petition for a writ of certiorari also asserts that her ability to present her case was thwarted and she was denied a fair trial, defendant Delmark is compelled to address the discovery issues insofar as they are alleged to relate to plaintiff's presentation of her case and the fairness of her trial.

While discovery rules are accorded broad treatment, they are not without limitations. "Privileged matters are not discoverable." Rule 26(B)(1) Federal Rules of Civil Procedure.

Petitioner argues that discovery of the names of persons who complained of ill effects or who died while on the Optifast diet "would only reveal that at the time these patients commenced the diet, they were grossly overweight." Petitioner characterizes "being grossly overweight" as a cosmetic problem rather than as a chronic disease. Revelation of the requested information would indicate individuals with heart conditions, hypertension, arthritis, diabetes in conjunction with emotional and mental problems associated with the severe chronic disease of obesity.

Obviously, conditions such as heart disease, diabetes, hypertension, mental and emotional trauma are not "plain to the observation of anyone" such that Petitioner would be justified in relying upon *In Re Albert Lindley Lee Memorial Hospital*, 209 F.2d 122 (1953) and *Klein v. Prudential Insurance Co. of America*, 177 N.E. 942 at pages 12 and 13 of Petitioner's Brief. Moreover, the cases cited by Petitioner are distinguishable on the facts.

Petitioner is well aware that when applying to Mt. Sinai, Charles Quenneville completed a questionnaire answering such questions as his weight from age 10 to present, other methods of diets previously tried and for how long, how much weight was lost on those diets, eating habits, symptoms (shortness of breath, falling asleep at odd time, back pain, swelling of legs, etc.), illnesses (diabetes, heart disease, high blood pressure, kidney disease, psychiatric treatment), current medications and the applicant's reasons for wanting to lose weight. Charles Quenneville's treating physician, Dr. Stoyka, wrote to Mt. Sinai on March 18, 1977, indicating that Mr. Quenneville was under his care for hypertension and pathologic obesity.

Clearly, all of these symptoms, physical, mental and emotional, are communications by patients to their physi-

cian on the Mt. Sinai Diet Program. The symptoms, past history, reasons for losing weight, are not plain to the observation of anyone but are part of the intricate process of a physician examining, diagnosing and treating an individual patient.

It is stated in *In Re Roberts,* 106 Ohio App. 303 (1958 Cuyahoga County):

> "It will be noted from the foregoing that privileged communications between patient and physician may be by exhibition of the body to the physician for examination or treatment as well as by oral or written communications between physicians and patients and that a physician may not testify in respect to either unless there is a waiver in reference thereto." (*Id.* pg. 309.)

In the case at bar, the Mt. Sinai physicians were not at liberty to reveal the names and addresses of individuals who had presented themselves to the doctors, voluntarily, for examination and treatment of the disease of morbid obesity.

It was stated in *In Re Winstead,* 67 Ohio App. 2d 111 (Summit Cty. 1980):

> "The rationale for excluding material evidence offered by a treating physician is to encourage free disclosure by the patient to the doctor and, thus, to facilitate proper diagnosis and treatment.
>
> When the privilege arises, it belongs to the patient. The primary prerequisite to the creation of '. . . the privilege' is that the patient must have consulted the physician for treatment or for diagnosis looking toward treatment." (*Id.* pg. 114.)

It was held in *General Motors v. The Director of N.I.O.S.H.*, 459 F. Supp. 235 (S.D. Ohio 1978):

> ". . . Generally, an Ohio physician may not disclose a patient's medical records without the patient's consent. ORC §2317.02 and 4731.22; *Hammonds v. Aetna Casualty & Surety Co.*, 237 F. Supp. 96 (N.D. Ohio 1965).
>
> The purpose of this rule '. . . is to encourage patients to make a full disclosure of their symptoms and condition to their physicians without fear that such matters will later become public.' *State v. Antill*, 176 Ohio St. 61, 197 N.E.2d 548, 551 (1964). . .
>
> In the absence of some compelling need to identify individuals at this time by N.I.O.S.H., it would seem that individual rights of a person should not be taken from him without his knowledge and without an opportunity to be heard." (*Id.* pg. 239.)

Providing the names and addresses of individuals with complaints of ill effects while on the Mt. Sinai diet would be publicizing a specific diagnosis of morbid obesity and the prescribed treatment for each individual. It is precisely this type of publication which the physician/patient privilege is designed to protect.

Petitioner admits at page 13 of her Brief "that the disease itself, of which the plaintiff has not requested disclosure, is a matter between physician and patient, subject to the protection of §2317.02." Petitioner claims she did not request the revelation of the underlying disease causing the physical condition of being obese. However, Petitioner did not merely request the weights of all persons on the Mt. Sinai Diet Program. Petitioner asked for the names and addresses of all persons having complaints of ill effects

while taking Optifast. Were defendants to reveal the names and addresses of all persons having complaints of ill effects while taking Optifast, defendants would, without an express waiver from all of those individuals, be revealing to plaintiff the specific disease of morbid obesity, the treatment they were receiving, i.e., Optifast and the Mt. Sinai Diet Program. Under Ohio law, a physician may not testify with respect to his examination of any patient's body or the treatment prescribed to that patient or any oral or written communication made by the patient to the physician absent a waiver from the patient.

Petitioner's argument with respect to society's view of the stigma of obesity is totally without support in the record and has absolutely no bearing upon whether or not the trial court unjustifiably departed from the usual and accepted course of judicial proceedings by precluding the plaintiff from discovering the names and addresses of all persons who had complained of any ill effects resulting from the use of the Optifast diet or who died while on the diet.

It should again be specifically noted that plaintiff's expert, Dr. Sours, had the information sought by the Interrogatories available at the time of the trial. Dr. Sours testified as to the number of individuals who had reportedly died while using some form of a "liquid protein" diet. Even if the trial court erred in not compelling answers to the Interrogatories on the basis of privilege, the error was harmless and has not been shown to have "thwarted" plaintiff's presentation of her case at trial and the Sixth Circuit Court of Appeals so held.

While it is true that the trial court may allow the exchange of privileged information, whether or not the trial court does so is purely discretionary. Petitioner has

not demonstrated any abuse of discretion on the part of the trial court. Petitioner asserts that the trial court's denial of the motion to compel discovery "prevented the plaintiff from discovering information that was important for her preparation for trial." Yet, Petitioner never indicates why the information was important for her preparation for trial, particularly since plaintiff's expert, Dr. Sours, already had the information plaintiff was seeking.

Petitioner's argument with respect to the testimony of Dr. Norval Barker, Delmark's expert witness, is totally without merit. Petitioner argues that the trial court, by refusing to admit any evidence concerning the problems with the Optifast diet, allowed the creation of the impression that the defendants had 600,000 patient weeks of experience with Optifast without any problems, except, possibly, for the death of Mr. Quenneville. As Petitioner well knows, there was no objection to the question posed to Dr. Norval Barker as is specifically indicated in Appendix, pages D-1 and D-2 to Petitioner's Brief. Even though counsel for the plaintiff failed to object to counsel for Delmark's question to Dr. Norval Barker, the question was in fact modified for the benefit of the jury so that it inquired only as to the number of patient weeks Optifast had been used as of the end of 1977. Petitioner's assertion that she was prejudiced because the trial court allowed the creation of the impression that defendant had 600,000 patient weeks of experience with Optifast without any problems is an attempt to mislead this court. The record of Dr. Norval Barker's direct testimony, as contained in Appendix D-1 and D-2 of Petitioner's Brief, clearly indicates that, as of the end of 1977, Optifast had been used for 250,000 patient weeks which is equivalent to approximately 25,000 to 30,000 patients.

Petitioner has failed to demonstrate how she was prejudiced by a question to which there was no objection and one which was modified following a side-bar conference.

CONCLUSION

Disclosing the names and addresses of all persons having complaints of ill effects while taking Optifast on the Mt. Sinai Diet Program would have violated the physician/patient privilege since the only reason for applying to Mt. Sinai's Diet Program was to be treated for the specific disease of morbid obesity, regardless of the underlying cause of the disease. The patients were not being treated for the cosmetic symptom of obesity but were being treated for the disease, whether caused by diabetes, hypertension, emotional distress or genetic abnormality.

Petitioner's argument with respect to the testimony of Dr. Norval Barker pertaining to the number of patient weeks of experience with Optifast is totally without merit. Petitioner failed to demonstrate how she was prejudiced by a question to which there was no objection and one which was modified following a side-bar conference.

The trial court and the Sixth Circuit Court of Appeals followed the accepted and usual course of judicial proceedings by determining that the information sought by plaintiff was protected by the physician/patient privilege and was not discoverable. Petitioner has not demonstrated the manner in which the trial court or the Court of Appeals departed from the accepted and usual course of judicial proceedings nor has Petitioner demonstrated how any

alleged departure thwarted her ability to present her case and denied her a fair trial.

Respectfully submitted,

LOUIS PAISLEY, *Counsel of Record*
CAROLYN M. CAPPEL
2500 Terminal Tower
Cleveland, Ohio 44113
(216) 241-6602
Counsel for Respondent
Delmark Company, Inc.

Of Counsel:

WESTON, HURD, FALLON,
PAISLEY & HOWLEY

(THIS PAGE INTENTIONALLY LEFT BLANK)